

**Office of Chief Counsel
Internal Revenue Service**

Memorandum

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to: James Roosey, Program Manager
Retail, Food, Pharmaceuticals, and Health
(Field Operations West - Territory 2)

from: M. Grace Fleeman, Senior Technical Reviewer, Branch 1(International)
Ana C. Guzman, General Attorney, Branch 1
(International)

subject: Notice of Withdrawal of Ruling Request PLR-125404-06

In accordance with section 7.07(2) of Rev. Proc. 2007-1, 2007-1 I.R.B. 1, we are providing you with notification of a taxpayer withdrawal of a private letter ruling request. On December 11, 2006, the taxpayer's representative withdrew the above-referenced request for a private letter ruling after this office advised such taxpayer and its representative of its tentative conclusions. Following is a brief discussion of the issue, facts, applicable law, and the reason for this office's tentative conclusions. A copy of the taxpayer's request is attached. This memorandum is not binding on Examination or Appeals and is not a final case determination. This document is not to be used or cited as precedent.

LEGEND

Payor =

Parent =

Products =

Earnings =

Country A =

Treaty =

FSA =

ISSUE

Whether Earnings paid by Payor to a _____ who is a resident of Country A (“Country A _____”) with respect to purchases and sales of Products by _____ in the United States (“U.S. _____”) are exempt from U.S. tax under the treaty.

CONCLUSIONS

Based on the information available to us, our tentative conclusions are as follows:

1. Earnings paid to a Country A _____ who is a nonresident alien individual constitute income in respect of independent personal services that, pursuant to Article XIV of the Treaty, may be taxed in the United States only to the extent attributable to a fixed base that is, or was, regularly available to the Country A _____ in the United States. Earnings that are exempt from U.S. tax pursuant to Article XIV may be exempt from withholding under section 1441 if the Country A _____ provides a properly completed Form 8233.

2. Earnings paid to a Country A _____ that is a foreign corporation constitute business profits that, pursuant to Article VII of the Treaty, may be taxed in the United States only to the extent attributable to a permanent establishment in the United States through which the Country A _____ carries on, or has carried on, business. Earnings that are exempt from U.S. tax pursuant to Article VII may be exempt from withholding under section 1442 if the Country A _____ provides a properly completed Form W-8BEN.

FACTS

Payor is an indirect U.S. subsidiary of Parent, a _____ corporation. Parent and its subsidiaries constitute a _____ company that sells

Products. Products are distributed through . The ruling request relates solely to the taxation of Country A .

Country A are generally individuals, although there are currently some that are corporations. Payor represents that the Country A are independent contractors and not employees of Payor.

A may earn income in two ways:

1. A may buy Products directly from Payor or an affiliate and sell those Products to the ultimate customers. The pockets the difference between the discounted price the pays for the Products and the full price paid by the ultimate customers. Payor did not request a ruling with regard to this income.

2. In addition,

receive Earnings based on purchases and sales by . The Earnings that were the subject of the ruling request are paid by Payor to Country A based on purchases and sales by who are U.S. residents. The U.S. are not dependent agents or employees of the Country A whose products they purchase and sell.

), Payor has been withholding 30% of the Earnings paid to who are nonresident alien individuals and foreign corporations.

LAW AND ANALYSIS

Our conclusion, based on all the information available to us, is that Earnings paid to Country A are compensation for the Country A services, as measured by the sales production of the U.S. . These services are performed by Country A in a number of ways, including contacts in person, by telephone, or through the Internet. If, within a particular taxable year, any of the services are performed within the United States, the Country A is engaged in trade or business within the United States for that year. Code § 864(b). Earnings attributable to services performed within the United States are from sources within the United States, while Earnings attributable to services performed in Country A (or elsewhere outside the United States) are from sources without the United States. Code § 861(a)(3), § 862(a)(3).

Nonresident alien individuals. Under Article XIV of the Treaty, income derived by an individual who is a resident of Country A in respect of independent personal services

may be taxed in the United States if the individual has or had a fixed base regularly available to him in the United States, but only to the extent that the income is attributable to the fixed base. Thus, even if a Country A who is an individual performs some services in the United States resulting in some U.S.-source income, the Earnings attributable to those services would not be subject to U.S. tax unless they were attributable to a fixed base.

Under Treas. Reg. § 1.1441-4(b)(1)(iv) and Treas. Reg. § 1.1441-4(b)(2), Earnings paid to a Country A who is an individual may be exempt from withholding under section 1441 if the Country A provides a properly completed Form 8233.

Foreign corporations. Under Article VII of the Treaty, the business profits of a foreign corporation that is a resident of Country A may be taxed in the United States if the foreign corporation carries on business in the United States through a permanent establishment situated in the United States, but only to the extent that the business profits are attributable to the permanent establishment. Thus, even if a Country A that is a foreign corporation performs some activities in the United States resulting in some U.S.-source income, the Earnings attributable to those activities will not be subject to U.S. tax unless they are attributable to a permanent establishment.

Under Treas. Reg. § 1.1441-6(b), Earnings paid to a Country A that is a foreign corporation may be exempt from withholding under section 1442 if the Country A provides a properly completed Form W-8BEN.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call (202) 622-3880 if you have any further questions.